

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

JANUARY 24, 2000

IN RE:)	
)	
UNITED TELEPHONE SOUTHEAST, INC.,)	DOCKET NO.
TARIFF TO REFLECT PROPOSED)	98-00626
CHANGES UNDER PRICE REGULATION PLAN)	

ORDER DENYING PETITION FOR REHEARING

This matter came before the Tennessee Regulatory Authority ("Authority") on the tariff filing of United Telephone Southeast, Inc. ("United") to reflect proposed changes under its price regulation plan pursuant to Tenn. Code Ann. § 65-5-209. A hearing was held in this docket on May 13, 1999, and the Directors of the Authority subsequently deliberated the issues presented by UTSE's tariff filing at a regularly scheduled Authority Conference held on August 10, 1999. The Authority entered the Final Order in this matter on October 13, 1999. Thereafter, the Consumer Advocate Division, Office of the Attorney General ("Consumer Advocate") filed a Petition for Rehearing (the "Petition") on October 28, 1999. The Authority considered the Petition at a regularly scheduled Authority Conference on November 23, 1999.

The Consumer Advocate filed its Petition pursuant to Tenn. Code Ann. § 65-2-114, which requires that a party seeking rehearing file a petition within fifteen (15) days from the entry of the Final Order. The Consumer Advocate complied with this requirement.

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Tenn. Code Ann. § 65-2-115 requires that the parties of record are served with copies of the petition and that those parties may, if they choose, file replies thereto. Pursuant to Tenn. Code Ann. § 65-2-115, United filed its reply to the Consumer Advocate's Petition on November 8, 1999, while BellSouth Telecommunications, Inc. ("BellSouth") filed its reply on November 9, 1999.

In considering the Consumer Advocate's Petition, the Authority's action is controlled by Tenn. Code Ann. §§ 65-2-116 and 65-2-118. Tenn. Code Ann. § 65-2-116 states as follows:

Such petition for rehearing will lie only for the following grounds:

- (1) Some material error of law committed by the authority;
- (2) Some material error of fact committed by the authority; or
- (3) The discovery of new evidence sufficiently strong to reverse or modify the authority's order, and which could not have been previously discovered by due diligence.

Tenn. Code Ann. § 65-2-118 states as follows:

The authority may, in its discretion, set the petition down for hearing or enter an order with reference to the petition without a hearing; provided, that in any event the authority shall dispose of the petition within thirty (30) days after filing thereof. If the authority enters no order disposing of the petition within the thirty-day period, the petition shall be deemed to have been denied as of the expiration of the thirty-day period.

Each of these statutes sets forth, with specific detail, the requirements which the petitioning party must follow when seeking rehearing as well as those which the Authority must follow in its disposition of such petitions.

As set forth above, Tenn. Code Ann. § 65-2-116 requires that rehearing should be sought only when: (1) a material error of law has been committed; (2) there is a material

error of fact; or (3) new evidence sufficiently strong to reverse or modify the Final Order has been discovered. In its Petition, the Consumer Advocate alleges that the Authority committed numerous errors of law and fact in rendering its decision in this docket. After a thorough review of the Petition and earlier pleadings filed by the Consumer Advocate, it is apparent that the allegations set forth in the Petition repeat the original arguments presented by the Consumer Advocate during the course of this proceeding, and the Petition presents no new arguments to the Authority.

The Consumer Advocate's assertions take issue with how the Authority interpreted Tenn. Code Ann. § 65-5-209(e) and subsequently applied that statute to the Stipulated Price Indexing Methodology ("Stipulation"). In this proceeding, the Authority was asked to consider whether Tenn. Code Ann. § 65-5-209(e) limits the amount of the annual increase to the lesser of one-half ($1/2$) the rate of inflation or the rate of inflation less two percent (2%) per year, or whether the statute permits a company to calculate the maximum annual increase by including the amount of increases for past years that were proper but were not previously utilized.

In considering this issue, the Authority determined that notwithstanding the Consumer Advocate's argument to the contrary, Tenn. Code Ann. § 65-5-209(e) does not prohibit a price-regulated company, such as United, from taking cumulative increases for non-basic rates pursuant to the terms of the Stipulation. In arriving at this conclusion, the Authority both relied upon the evidence presented at the hearing and considered arguments made by the parties concerning the interpretation of the statute. Based upon the record presented, the Authority concluded that the Stipulation and Tenn. Code Ann. § 65-5-209(e) permit the cumulative increases sought by United. The Authority finds no material error of

fact or law existing in its interpretation of the statute, or in its application of the statute and the Stipulation to United's price regulation filing.

The Consumer Advocate further alleges that the Authority committed errors of fact and law regarding the Authority's disposition of the pay-telephone subsidy issue. The Consumer Advocate specifically alleges that the Stipulation is preempted by 47 U.S.C. § 276 (b)(1)(B) and that the Consumer Advocate should have been given the opportunity to conduct discovery concerning the amount of the subsidy.

The Consumer Advocate presented its argument on the issue of preemption in its post-hearing brief filed on June 28, 1999.¹ The Authority, in its disposition of this case, did not address the preemption argument because it was determined that the requirements of 47 U.S.C. § 276 (b)(1)(B) and of the FCC order in *CC Docket 96-128* required that the pay-telephone subsidy be removed from base rates. In making this determination, the Authority recognized that these requirements are harmonious with the requirements of Tenn. Code Ann. § 65-5-208(c) prohibiting cross-subsidization, and that 47 U.S.C. § 276 (b)(1)(B) did not preempt the application of the Stipulation.

Finally, the Consumer Advocate's request for discovery concerning the pay-telephone subsidy issue was rendered moot during the May 13, 1999 Hearing, when the Consumer Advocate agreed that live rebuttal testimony by the Consumer Advocate's witness and the cross-examination of United's witness concerning the pay-telephone subsidy would be sufficient to address this issue.² Any due process concerns that the Consumer Advocate might have regarding this issue are protected because the Consumer

¹ The Consumer Advocate dedicated half of its brief to this argument. See *Post-Hearing Brief of the Consumer Advocate* (June 28, 1999) pp. 15-29.

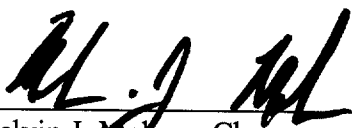
² See Hearing Transcript, (May 13, 1999), pp. 55-62.

Advocate will have the opportunity to actively participate in the development of the record in Docket No. 97-00409 — *Tariff Filings Regarding the Reclassification of Pay Telephone Service as Required by FCC Docket 96-128*. In addition, the Authority's October 13, 1999 Final Order states, at note 35, that "[I]f the amount of the subsidy is revised [in *Docket No. 97-00409*], the aggregate revenue cap [will be] amended accordingly." Therefore, the Consumer Advocate is assured a meaningful opportunity to participate in the full resolution of the pay-telephone subsidy issue.

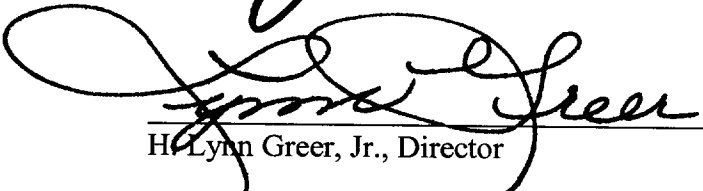
In consideration of the foregoing, and after careful review of the record, the Petition and the responses thereto, the Authority finds that the Consumer Advocate's Petition for Rehearing should be denied.

IT IS THEREFORE ORDERED THAT:

1. The Consumer Advocate's Petition for Rehearing is denied.



Melvin J. Malone, Chairman



H. Lynn Greer, Jr., Director



Sara Kyle, Director

ATTEST:



K. David Waddell, Executive Secretary